DUNLOP (M) INDUSTRIES BHD.

v.

SEONG FATT SAWMILLS SDN. BHD.

HIGH COURT MALAYA, SEREMBAN
AJAIB SINGH J
[CIVIL SUIT NO. 244 OF 1977]
9 JANUARY 1982

TORT: *Negligence - Injunction to restrain acts or nuisance and abate nuisance - Claim for damages - Overflow of rain water into neighbouring land causing extensive damage to land, roads, buildings and goods stored therein - Substantial earth works altering natural structure of land on adjacent land - Common boundary - Drain closed up by silt and debris - No approval obtained from Municipality to carry out earthworks.*

The plaintiff's land stood adjacent to the defendant's land. A natural stream ran through the centre of the defendant's land which eventually joined the plaintiff's land along the boundary on to a monsoon drain inside the plaintiff's land.

The defendants later altered the natural structure of their land by, *inter alia,* raising the level of their land by almost four feet above the level of the plaintiffs land.

The plaintiffs claim that by reason of the defendants carrying on substantial earth works on their land a dangerous situation had been caused whereby rain water had overflowed into the plaintiffs land causing extensive damage to the plaintiff's properties. Their claim was based on nuisance and negligence and also for special damages.

The defendants denied that their water had flowed over to the plaintiff's land by their negligence. They denied that they owe any duty to the plaintiffs and also deny the claim for special damages.

Held:

[1] The defendants had raised the level of their land and had built a timber shed thereon without the permission of the relevant authorities and in doing so diverted a natural stream which was flowing over that part of the land. This deviation was insufficient and inefficient for the purpose of getting the water to flow smoothly out of their land. The deviation was in fact an earth drain dug along the boundary of the plaintiffs' land.

[2] The defendants had completely disregarded the consequences of their action and ought to have foreseen the damage which the rain water flowing from their land would have caused to neighbouring land because the natural flow had been diverted and the drain dug along the boundary was inadequate for the free flow of water.

[3] The Court was satisfied that the plaintiffs have proved negligence on the part of the defendants which had resulted in damage to the plaintiffs' land and property and that the situation created by the defendants amounts to nuisance.

[Plaintiffs' claim allowed with special damages and costs. Defendants to abate nuisance forthwith in such manner as the parties may mutually agree failing which defendants to put up scheme for consideration of Court.]

Other source referred to:

Clerk & Lindsell on Torts, 13th Edn., p. 851, para. 1498

For the plaintiffs - V.C. George
For the defendants - Lim Kean Chye & K. Sothinathan

JUDGMENT

Ajaib Singh J:

The plaintiffs in this case sued the defendants for damages, for an injunction to restrain the defendants from continuing alleged acts of nuisance and to abate the nuisance.

In the statement of claim the plaintiffs averred that by reason of the defendants carrying on substantial earth works in or about early 1974 on their land adjacent to the plaintiffs' land a dangerous situation had been caused whereby rain water had overflowed into the plaintiffs' land causing extensive damage to the plaintiff's land, roads, buildings and their goods which had been stored therein. Their claim was based on nuisance and negligence particulars of which have been set out in the statement of claim. They also claim by way of special damages a total sum of RM152,450 representing the damage to their land, buildings and goods.

In the statement of defence the defendants denied that their water had flowed over to the plaintiff's land by their negligence and they denied that they owed any duty to the plaintiffs in respect of the matters complained of by the plaintiffs. They also denied the claim for special damages and put the plaintiffs to strict proof thereof. Finally they alleged that the plaintiffs have no cause of action against the defendants and pray that the plaintiffs' suit be dismissed with costs.

The plaintiffs' and the defendants' land have a common boundary. The plaintiffs' case is that the defendants altered the natural structure of their land which resulted in overflowing of water from their land on to the plaintiffs' land. Before the alterations were carried out there was a natural stream running through the centre of the defendants' land. This stream joined the plaintiffs' land along the boundary on to a monsoon drain which also ran along the boundary but inside the plaintiffs' land and on to another monsoon drain at the junction of Loop Road and Rasa Road in front of the plaintiffs' factory. The stream which ran through the defendants' land widened at two pools on the defendants' land. This had the effect of slowing down the rain water and thus avert flooding during the rainy season.

In April - May 1973 the defendants cut the side of the hill on their land and filled their land. They filled up the ponds and raised the level of their land by almost four feet above the level of the plaintiff's land. The natural stream which was previously running through the middle of the defendants' land and then joining the plaintiffs' monsoon drain along the common boundary was diverted by the defendants. This they did by building an earth drain along the border and this drain entered the plaintiff's land into the plaintiffs' earth drain. The plaintiff's earth drain was meant to take water from the rear of the plaintiffs' land but now they had to take water also from the defendants' drain which the defendants had now constructed and which ran along the plaintiffs' boundary along a cliff. The defendants had built the drain right at the cliff - one bank of the drain being the cliff itself. It was a plain earth drain and had four right angles before it entered the plaintiff's drain.

Dilip Kumar Bardhan (PW1) the manager of Dunlopillo factory in Rasa Road said in his evidence that he observed that every time it rained chunks of earth would fall off from the cliff closing off the defendants' drain down below and also breaking up the plaintiffs' fence. He said that portions of the plaintiff's road were broken up as well as part of a chain-link fence which ran along the common boundary. He said that when he saw all this erosion going on he met the defendants' manager Mr. David Chan and expressed his concern about

the erosion and the collapsing of the fence and the road. He said that Mr. David Chan promised to build a concrete retaining wall along the cliff and said that he would also divert the drain in order to give a smooth flow of water. PW1 said further that he had several meetings with Mr. David Chan and had also sent letters to him from May 1974 onwards but received no response.

The first flood occurred on 11 November 1976 around the area where the plaintiffs' drain met the outlet of the defendant's drain. PW1 found that the outlet was blocked by debris, sawn timber and rubbish all along the drain towards the outlet. The chain-link fence near the outlet was slightly bent. He saw Mr. David Chan the next morning but was told that in the wet season nothing could be until it was over. A few days later on 19 November, 1976 there was another flood after heavy rainfall. Describing this flood PW1 said as follows:-

> On 19 November 1976 in the afternoon I was in my office at the factory. It was raining. I heard a commotion and I saw water running under the door of my office. I went out to the corridor and I saw water rushing in like mad as if a bund had broken. The water was muddy with silt and rubbish. The water also carried timber pieces and debris - and drums and crates. I then went to the back of the factory from where the water was rushing. The water was about 12-14 inches deep. I waded through and went to the back of the factory to the outlet. This time I saw that the fence had completely collapsed to our land. The outlet was all blocked with sawn timber, debris and wood. Our drain was running full at that time. Along our drain we had built a bunk about 2 feet high. At that time the drain water had risen about one foot up the bunk.

PW1 said that as a result of the flood damage was caused to the factory and goods and they also lost a few days of work. He said that until November 1976 they had not suffered any flood damage. There was a culvert at the entrance of their factory and he had noticed that when there was heavy rain the water would build up from the culvert towards Loop Road but never into the factory itself. This build-up of water was caused by pipes which had been laid by the LLN and when he got the pipes placed further away there was no more flood in the culvert area.

There was yet another flood in November 1977 when the water came from the front and into the factory. PW1 said that it was not a big flood. The water was about an inch at the most and it did not cover the whole factory area - it affected the hand building section only. Roadworks were being carried on by the JKR at that time in the front of the factory and when these were completed there was no flood problem anymore from the front.

In cross-examinations PW1 said that he required the defendants to put up a retaining wall so that the cliff would not erode and fall into the stream. He denied that the real reason for the retaining wall was to prevent dirt from falling into the stream and on to the plaintiff's well. He said that he had explained the danger of flooding to Mr. David Chan in his conversation with him. PW1 said that the land development by the defendants had upset the whole natural flow of water from the valley beyond and the drains got blocked by silt and debris. He said that prior to the 1976 floods the plaintiffs had no flood problems and their own drain was adequate. After the floods in November 1976 the plaintiffs enlarged their section of the drain from two feet to six feet wide and the depth by one foot. The flood in the year 1977 was from the front of the factory and not from behind.

In re-examination PW1 said that the cause of the flooding in November 1976 was the closing up of the drain by silt and debris. This resulted in water overflowing on to the defendants' land and coming into the plaintiffs' land. Sawn timber and debris all came from the defendants'

land which was being used as a timber yard by the defendants. The silt came from the breaking up of the banks of the drain on the defendants' land. He said that if a retaining wall had been erected it would still not have prevented flooding. To prevent flooding the defendants should have straightened out their drain.

Lim Heng Shea (PW3) the chief engineer of the Seremban Municipality said that there was no planning application by the defendants to carry out any earth works on their land or to build a large timber shed. He said it was necessary to obtain permission to erect a retaining wall or to build a timber yard. He also said that in order to divert a natural stream a consultant engineer has to be engaged who would submit plans for the diversion. And before granting approval the Municipality would consider first whether there is available land for the diversion and secondly whether the diversion as proposed is adequate to discharge the water. PW3 said that he had seen the land after the flood and had also seen the approved contour map. He said that the defendants' land had been changed - flattened and there was no drain provided.

Mohamed Tahir bin Haji Abdul Manan (PW4) a consultant engineer said that he had seen the report of Messrs Chester Ho which was put in by the defendants and had made his comments on it in his telex. (Ex.C). PW4 after commenting on the report by Mr. Chester Ho said that the cause of the flood in 1979 was as follows:

> The water overflowed the banks of the drain due to the insufficient size of the drain the water ran all over the place. If the water is large in quantity it takes away with it all the rubbish including the planks shown in the photographs and get deposited at the fence or at the lowest point of entry into Dunlopillo land. This rubbish forms a dam at the fence thereby causing the build up of water until such level where the fence collapsed and the water just overflowed on the other side - the Dunlopillo side.
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> Q. Assuming that there were no floods prior to this one - Why were there no floods before this one in the area?
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> A. I can only say that the area had been disturbed - previously there was this stream and drains - and these had been disturbed. The stream may not have been adequate but there were the ponds mentioned in Mr. Chester Ho's report which controlled any flooding. With the conditions as they are now there may be a flood there again.
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> Q. What has to be done to avert further floods?
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> A. The drain in the Seong Fatt's land should be improved to cater for the runoff from the whole of the catchment area. First the size of the drain should be in accordance with the design and should be constructed giving the water to flow easily. This can be achieved by a concrete lined drain. When the drain is close to the cliff a retaining wall should be built to prevent any erosion to occur.
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> Q. The dimensions of the drain?
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> A. This is arrived at by considering the density of the rainfall and the area of catchment. The calculation would be somewhat similar to those of Mr. Chester Ho's report at pages 3 and 4.
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> Q. If the defendants insist that the drain should be run at right angles to the boundary of the land?
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> A. The drain should be in a straight line but if it is going to be at right angles it can be done by constructing a sump at each of the right angle. The kink should be avoided altogether and the drain taken to join the sump which is nearby in Dunlopillo land. Yes, in this particular land the whole drain design should be done by a consultant engineer.

The plaintiffs also called a valuer V.P. Tharmalingam who gave evidence relating to the damage caused to the plaintiffs' land, buildings and goods. They also called their senior clerk P.K. Paul who gave evidence as to the loss of working hours as a result of the floods. Tee Meng Wee the plaintiffs' accountant gave evidence on production costs of the plaintiffs' goods.

The defendants called four witnesses. The first was Ong Eng Kee (DW1) the Director of the Drainage and Irrigation Department Negeri Sembilan who gave technical evidence on rainfall. He also agreed with the technical report which was put in by the defence.

Chester Ho (DW2) said that the deviation of the stream in the defendants' land would not increase the flow of water. He said that the floods would have risen from the front portion of the building near the culverts and gone into the factory area. He was also of the opinion that the earth bund on the plaintiffs' land and which ran along the side boundary of the defendants' land was an impediment which would withhold the flow of water and cause floods. In cross-examination Chester Ho said that the defendants' land was about four feet higher which had ben filled with earth taken from the cliff's side. He still held the view which he had stated in his report - Bundle "B" p. 2.

The next witness for the defence was Dato' David Chan Foo Yew (DW3). His evidence was in general terms about the set-up of their land as well as the plaintiffs' land. He agreed that the defendants had diverted the stream and filled the ponds on the land. The last witness was Mohindar Singh (DW4). The evidence of this witness was not of much help really as he was trying to recollect the set-up of the land where he used to graze cows as a fourteen year old boy.

On the evidence before me I have come to the conclusion that the plaintiffs must succeed in their claim for damages against the defendants. I find the defendants liable in negligence and nuisance. I accept the evidence of the witnesses produced on behalf of the plaintiffs. As for the technical reports and the evidence of the experts I am of the view that on the totality of the evidence in this case the evidence adduced by the plaintiffs is in all probability correct and is to be preferred over that of the defendants' evidence.

Liability in respect of water is stated as follows in *Clerk & Lindsell on Torts* 13th Edn. at p. 851 para. 1498 -

> Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level. Nevertheless the higher proprietor is liable if he deliberately drains his land onto his lower neighbour's land and this appears to be so if the water is caused to flow in a more concentrated form than it naturally would, as the result of artificial alterations in the levels and contours of the higher land.

The defendants had raised the level of their land and had built a timber shed thereon. In doing so they diverted a natural stream which was flowing over that part of the land. This deviation was insufficient and inefficient for the purpose of getting the water to flow smoothly out of their land. The deviation was in fact an earth drain dug along the boundary of the plaintiffs' land. This drain was shallow uncemented and had kinks along it which contributed to the massing of water and flooding - and there were no sumps at the kinks to slow down the flow of water. The earth bund mentioned by Mr. Chester Ho could hardly have contributed to the floods. This bund is not at the rear of the factory but is along the side boundary and according to PW1 it was built as a precaution against water flowing over to the plaintiffs' land from the defendants' land. After the 1976 flood the bund was raised by one foot.

The plaintiffs had warned the defendants in May 1974 verbally as well as by letters of the dangers as there were instances of pieces of the cliff adjoining the plaintiffs' land falling into the drain below. The defendants had promised to put up a retaining wall but they never did so. They had also not got the permission of the relevant authorities to built a timber shed and the deviation of the stream. According to PW3 this permission was necessary and in order to divert a natural stream a consultant engineer had to be engaged for the submission of plans and approval. The defendants had completely disregarded the consequences of their action and ought to have foreseen the damages which the rain water flowing from their land would have caused to neighbouring land because the natural flow had been diverted and the drain dug along the boundary was inadequate for the free flow of water.

On the evidence before me I am satisfied that the plaintiffs have proved negligence on the part of the defendants which had resulted in damage to the plaintiffs' land and property. I also accept their contention that the situation created by the defendants amounts to a nuisance. As to the extent of the damage caused to the plaintiffs' buildings and goods I agree with the figures set out by the plaintiffs which are based on proper calculations.

The plaintiffs' claim is allowed and I order that the defendants abate the nuisance forthwith in such manner as the parties may mutually agree failing which a scheme may be put up by the defendants for the consideration of the Court.

Also found at CLJ [1982] 129